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9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

13 SAN FRANCISCO TECHNOLOGY INC.,
14

15 Plaintiff,
16

v.
17

17 THE GLAD PRODUCTS COMPANY, BAJER
DESIGN & MARKETING INC., BAYER
18 CORPORATION, BRIGHT IMAGE
CORPORATION, CHURCH & DWIGHT CO.
19 INC., COLGATE-PALMOLIVE COMPANY,
COMBE INCORPORATED, THE DIAL
20 CORPORATION, EXERGEN CORPORATION,
GLAXOSMITHKLINE LLC, HI-TECH
21 PHARMACAL CO. INC., JOHNSON
PRODUCTS COMPANY INC., MAYBELLINE
22 LLC, MCNEIL-PPC INC., MEDTECH
PRODUCTS INC., PLAYTEX PRODUCTS
23 INC., RECKITT BENCKISER INC., ROCHE
DIAGNOSTICS CORPORATION,
24 SOFTSHEEN-CARSON LLC, SUN PRODUCTS
CORPORATION, SUNSTAR AMERICAS INC.,

25 Defendants.
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Case No.: CV10-00966 JF PVT

Judge: Hon. Jeremy Fogel
Date: July 8, 2010
Time: 1:30 p.m.
Courtroom: 3, 5th Floor

**DEFENDANT BAYER
CORPORATION'S REPLY IN
SUPPORT OF MOTION TO STAY**

Complaint Filed: March 5, 2010

I. INTRODUCTION

Defendant Bayer Corporation (“Bayer”) previously joined the Notice of Motion and Motion to Stay filed by defendant Bajer Design & Marketing, Inc. (“Bajer”). (Dkt. No. 156.) On May 13, 2010, Bajer entered into a stipulation to stay the action with plaintiff San Francisco Technology Inc. (“SFTI”). (Dkt. No. 171.) The Court signed the stipulation and order staying the action with respect to Bajer on May 28, 2010. (Dkt. No. 189.) SFTI also offered a stipulated stay to Bayer which Bayer accepted, but SFTI subsequently reneged on the proffered stipulation. Consequently, Bayer herein replies in support of the Motion to Stay, and Bayer will appear and argue the motion on its behalf at the hearing on July 8, 2010.

SFTI’s opposition to defendants’ Motion to Stay (“Opp’n” (Dkt. No. 213)) does not provide any reason that should stop this Court from staying this action until the exact standing issue facing this Court is decided by the Federal Circuit in *Stauffer v. Brooks Bros.*, Fed. Cir. Appeal Nos. 2009-1428, 2009-1430, 2009-1453. Contrary to SFTI’s argument, the Federal Circuit’s *Pequignot* decision did not resolve the standing issue, but the Federal Circuit’s decision in *Stauffer* will.

II. ARGUMENT

A. The Federal Circuit’s *Pequignot* Decision Did Not Decide the Standing Issue

SFTI argues that the Federal Circuit’s decision in *Pequignot* resolved the standing issue. The *Pequignot* decision, however, said nothing whatsoever about standing. SFTI asserts that the Federal Circuit’s perfunctory statement in *Pequignot* that it had subject matter jurisdiction – “[w]e have jurisdiction pursuant to 28 U.S.C. § 1295(a)(1)” – resolved the standing issue. *Pequignot v. Solo Cup Co.*, No. 2009-1547, 2010 U.S. App. Lexis 11820, at *10 (Fed. Cir. June 10, 2010). But the standing issue was neither raised as an issue for appeal, nor was it considered by the Federal Circuit in *Pequignot*. As such, the decision did not address standing.

By contrast, the Federal Circuit will specifically examine standing in *Stauffer*. The question of whether an uninjured private party has standing under Article III of the United States Constitution to bring an action for false patent marking under 35 U.S.C. § 292(b) is currently

1 pending before the Federal Circuit in *Stauffer*. This is the same issue presented in Bayer's
 2 Motion to Dismiss. The Federal Circuit's decision in *Stauffer* will definitively resolve whether a
 3 private party who has suffered no cognizable injury (such as plaintiff in this case) has standing to
 4 bring claims for false patent marking. Even SFTI acknowledges that the "Federal Circuit will
 5 more squarely address the standing question in the appeal of *Stauffer v. Brooks Brothers*."
 6 (Opp'n at 2.) The *Pequignot* ruling did not decide the standing issue, but the *Stauffer* ruling will.

7 **B. SFTI Will Not Be Prejudiced By a Stay**

8 SFTI's opposition does not even address the fact that it will not be prejudiced by a stay
 9 pending issuance of the *Stauffer* decision. SFTI seeks only monetary penalties. SFTI has not
 10 alleged *any* injury to itself or anyone else. Thus, SFTI will not suffer any harm, much less
 11 irreparable harm, if the Court stays the case for a short period.

12 Furthermore, SFTI acknowledged that it will not be prejudiced by a stay in this action
 13 when SFTI entered into stipulations to stay the case with seven defendants, including the
 14 following: (1) The Glad Products Company; (2) Colgate-Palmolive Company; (3) Bajer Design
 15 & Marketing Inc., (4) Combe Incorporated; (5) Reckitt Benckiser Inc.; (6) The Dial Corporation;
 16 and (7) Johnson Products Company Inc. (Dkt. Nos. 189, 238.) The Court recently entered Orders
 17 staying the action with respect to the aforementioned defendants. (*Id.*)

18 The stipulations note that SFTI previously filed a substantially similar complaint asserting
 19 the same false marking claim against other defendants in *San Francisco Technology Inc. v. Adobe*
 20 *Systems Inc.*, No. 09 Civ. 6083 (N.D. Cal.) (Seeborg, J.). In *Adobe*, Judge Seeborg stayed the
 21 action pending resolution of *Stauffer*. As the stipulations state, "Judge Seeborg held in *Adobe* that
 22 the circumstances in which a private party has standing under Article III of the United States
 23 Constitution to bring a *qui tam* action for false patent marking under 35 U.S.C. §292(b) is *an*
 24 *issue of first impression* currently pending before the United States Court of Appeals for the
 25 Federal Circuit in *Stauffer*." (Dkt. Nos. 189 at 2, 238 at 2 (emphasis added).) SFTI's stipulation
 26 further notes that Judge Seeborg held that once the *Stauffer* decision is rendered, the Federal
 27 Circuit's reasoning and analysis will likely bear directly on the Court's consideration of the
 28

1 pending motions to dismiss. (*Id.*) In the stipulation, the parties agreed that Judge Seeborg's
 2 reasoning is "equally applicable" to this proceeding.

3 SFTI also offered Bayer a stipulation to stay the case, and Bayer accepted that stipulation.
 4 See Declaration of Daniel P. Muino, filed herewith, ¶ 3, Exh. A. However, before the written
 5 stipulation could be submitted to the Court, SFTI abruptly withdrew the proffered stipulation,
 6 asserting that a stay of the case was no longer appropriate after the Federal Circuit's decision in
 7 *Pequignot*. *Id.* SFTI's explanation makes little sense. The *Pequignot* ruling had issued on
 8 June 10, 2010, several days *before* SFTI offered the stipulation to Bayer. SFTI actually submitted
 9 a stipulation to stay the case with The Dial Corporation and Johnson Products Company on
 10 June 11, 2010, which was also after the *Pequignot* decision issued. (Dkt No. 199.) Moreover, as
 11 explained above, the *Pequignot* decision in no way resolved the standing issue.

12 The relevant law and factual circumstances have not changed since SFTI offered and
 13 entered into its stipulations to stay the case. Judge Seeborg's reasoning is still "equally
 14 applicable." See Dkt. Nos. 189 at 2, 238 at 2. Whether a private party has standing under Article
 15 III to bring a *qui tam* action for false marking under Section 292(b) remains "an issue of first
 16 impression." See *id.* By reversing its position regarding a stay of this action (and reneging on its
 17 proffered stipulation to Bayer), SFTI apparently hopes to achieve the judicially-inefficient result
 18 of advancing its claims against certain defendants while the same claims are stayed as to other
 19 defendants.

20 In addition to the *Adobe* case and the other stayed cases referenced in Bayer's Joinder
 21 (Dkt. No. 156), even more false marking cases have been stayed pending the *Stauffer* decision.
 22 See Request for Judicial Notice, Exh. H, *Hungerpiller v. Energizer Holdings, Inc.*, No. 2:10-cv-
 23 290-AKK, slip op. (N.D. Ala. June 9, 2010) (Kallon, J.) (staying case pending *Stauffer*); Exh. I,
 24 *Englehardt v. Costco Wholesale Corp.*, No. 1:10-cv-01424, minute entry (N.D. Ill. June 9, 2010)
 25 (Kocoras, J.) (staying case pending *Stauffer*); Exh. J, *Simonian v. Mead Westvaco Corp.*,
 26 No. 1:10-cv-01217, minute entry (N.D. Ill. June 3, 2010) (Castillo, J.) (staying case pending
 27 *Stauffer*); Exh. K, *Simonian v. Kimberly-Clark Corp.*, No. 1:10-cv-01214, minute entry (N.D. Ill.
 28 June 2, 2010) (Kocoras, J.) (staying case pending *Stauffer*); Exh. L, *O & G SearchQuest, Inc. v.*

1 *McNeill-PPC, Inc.*, No. H-10-1004, slip op. (S.D. Tex. May 24, 2010) (Atlas, J.) (staying false
 2 marking case pending the *Stauffer* decision); Exh. M, *Hollander v. B. Braun Medical, Inc.*,
 3 No. 10-835, slip op. (E.D. Pa. May 20, 2010) (McLaughlin, J.) (staying case pending *Stauffer*);
 4 Exh. N, *Heathcote Holdings Corp. v. Clorox Co.*, No. 1:10-cv-00942, minute entry (N.D. Ill.
 5 May 18, 2010) (Norgle, J.) (staying case pending *Stauffer*); Exh. O, *O & G SearchQuest, Inc. v.*
 6 *Procter & Gamble Co.*, No. H-10-1164, slip op. (S.D. Tex. May 17, 2010) (Atlas, J.) (staying
 7 case pending *Stauffer*); Exh. P, *Hirschhorn v. Church & Dwight Co.*, No. 2:10-cv-1156-JF, slip
 8 op. (E.D. Pa. May 17, 2010) (Fullam, J.) (staying case pending *Stauffer*); Exh. Q, *Simonian v.*
 9 *L'Oreal USA Creative, Inc.*, No. 10 C 1345, minute entry (N.D. Ill. May 14, 2010) (Coar, J.)
 10 (staying case pending *Stauffer*); Exh. R, *Creston Elec., Inc. v. Lutron Elec. Co.*, No. 10-01390
 11 (D. N.J. May 13, 2010) (Cavanaugh, J.) (staying case for 6 months pending *Stauffer*); Exh. S,
 12 *Hollander v. Hospira, Inc.*, No. 10-235, slip op. (E.D. Pa. May 6, 2010) (Dubois, J.) (staying case
 13 pending *Stauffer*); Exh. T, *Hollander v. Timex Group USA, Inc.*, No. 10-429, slip op. (E.D. Pa.
 14 May 5, 2010) (Schiller, J.) (staying case pending *Stauffer*).

15 **III. CONCLUSION**

16 For the reasons set forth above and in Bajer's Motion to Stay, the Court should stay all
 17 proceedings in this case until the Federal Circuit has issued a ruling in *Stauffer*.

18
 19 Dated: June 24, 2010

Respectfully submitted,

20 By: /s/ Daniel P. Muino

21 WESLEY E. OVERSON
 22 DANIEL P. MUINO
 23 DAISY DANIELLE COLEMAN

24 Attorneys for Defendant
 25 BAYER CORPORATION
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CERTIFICATE OF SERVICE

The undersigned certifies that on June 24, 2010, the foregoing document was filed with the Clerk of the U.S. District Court for the Northern District of California, using the court's electronic filing system (ECF), in compliance with Civil L.R. 5-4 and General Order 45. The ECF system serves a "Notice of Electronic Filing" to all parties and counsel who have appeared in this action, who have consented under Civil L.R. 5-5 and General Order 45 to accept that Notice as service of this document.

/s/ Daniel P. Muino

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BAYER CORPORATION